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SUPREME COURT, U.S.

IN THE SUPREME COURT
OF THE UNITED STATES
OCTOBER TERM, 1983

NO. _____

83-5354

TONY B. AMADEO,

Petitioner

v. ®

ROBERT O. FRANCIS,
WARDEN, GEORGIA
DIAGNOSTIC AND
CLASSIFICATION CENTER,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF GEORGIA

JOHN R. MARTIN
MARTIN and YOUNG
504 The Grant Building
44 Broad Street, N.W.
Atlanta, Georgia 30303
(404) 522-0400

WILLIAM M. WARNER
504 The Grant Building
44 Broad Street, N.W.
Atlanta, Georgia 30303
(404) 522-0880

ATTORNEYS FOR PETITIONER

QUESTION PRESENTED FOR REVIEW

WHETHER THE PETITIONER WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AS GUARANTEED TO HIM BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION IN THAT THE PETITIONER'S TRIAL COUNSEL FAILED TO CHALLENGE THE GRAND AND PETIT JURY COMPOSITION PRIOR TO THE TRIAL OF THE PETITIONER IN PUTNAM COUNTY, GEORGIA.

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BRIEF OF PETITIONER

The Petitioner, TONY B. AMADEO, respectfully prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of Georgia rendered on June 21, 1983, which denied his application for a certificate of probable cause to appeal the denial of habeas corpus relief, sought in Butts County, Georgia.

OPINIONS BELOW

The opinion of the Supreme Court of Georgia was entered on June 21, 1983, and is attached hereto as Appendix A. The Petitioner's Motion for Rehearing was denied by the Supreme Court of Georgia on July 7, 1983.

JURISDICTION

The judgment of the Supreme Court of the State of Georgia was entered on June 21, 1983, and is set out in Appendix A. A Motion for Rehearing was filed and denied on July 7, 1983. Jurisdiction of this Court is invoked under 28 U.S.C. 1257(3), the Petitioner having asserted below, and asserting here, deprivation of rights secured by the Constitution of the United States.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Fifth Amendment, United States Constitution:

No person...shall be...deprived of life,
liberty, or property, without due
process of law;...

Sixth Amendment, United States Constitution:

In all criminal prosecutions, the accused
shall...have the assistance of counsel for
his defense.

Fourteenth Amendment, United States Constitution:

...nor shall any State deprive any person
of life, liberty, or property, without due
process of law;...

O.C.G.A. §9-14-51 (Ga. Code Ann. §50-127(10))

All grounds for relief claimed by a petitioner
for a writ of habeas corpus shall be raised by
a petitioner in his original or amended
petition. Any grounds not so raised are
waived unless the Constitution of the United
States or of this state otherwise requires or
unless any judge to whom the petition is
assigned, on considering a subsequent
petition, finds grounds for relief asserted

therein which could not reasonably have been raised in the original or amended petition.

STATEMENT OF THE CASE

The Petitioner, TONY B. AMADEO, was accused of shooting James D. Turk, Sr. during the course of an attempted armed robbery on September 29, 1977, in Putnam County, Georgia, thereby causing Mr. Turk's death.

On November 30, 1977, the Petitioner was convicted of the capital felony of murder and of the felony of criminal attempt to commit armed robbery. The Petitioner was sentenced to the death penalty on the charge of murder and was sentenced to a term of 10 years on the charge of criminal attempt to commit armed robbery. A motion for New Trial was filed on December 21, 1977, and overruled on September 18, 1978, by the trial court. Notice of Appeal was filed on behalf of the Petitioner on October 17, 1978, and the appeal was docketed with the Supreme Court of Georgia on November 28, 1978.

The Georgia Supreme Court affirmed the Petitioner's conviction and sentence in a decision rendered on May 2, 1979, Amadeo v. The State, 243 Ga. 627 (1979). On May 29, 1979, the Petitioner's Motion for Rehearing was denied by the Georgia Supreme Court.

On January 30, 1980, a Petition for Habeas Corpus was filed in the Superior Court of Putnam County, Georgia, requesting an evidentiary hearing. On February 29, 1980, this petition was summarily denied by the trial court in Putnam County. On March 28, 1980, the Petitioner filed an Application for a Certificate of Probable Cause. This application was denied by the Georgia Supreme Court on September 10, 1980. A

Motion for Rehearing was subsequently denied on September 24, 1980. Subsequent to the Petitioner's trial and conviction, the entire jury lists involved in his indictment and trial were found to be unconstitutionally composed as a matter of fact and law by the United States District Court for the Middle District of Georgia in the case of Willie Bailey, et al v. Roy L. Vining, et al, Ga. No. 76-199-MAC. This jury composition issue was raised in the original state habeas corpus action filed by the Petitioner in his place of incarceration at the time, Putnam County, Georgia.

The Petitioner subsequently filed a petition for writ of certiorari in the United States Supreme Court to attempt to redress the denial of his petition in the Georgia Supreme Court. The petition was subsequently denied by an order of the United States Supreme Court dated March 30, 1981. On May 18, 1981, the petition for rehearing was denied.

On June 8, 1981, the Petitioner filed a Petition for Writ of Habeas Corpus by a Person in State Custody in the United States Court for the Middle District of Georgia. The Honorable Wilbur D. Owens, Jr. issued an order on September 22, 1982, dismissing the Petitioner's habeas without prejudice and leaving him with the choice of returning to the state courts to exhaust his ineffective assistance of counsel claim as it relates to the jury composition issues or of amending and resubmitting the habeas petition to present only the exhausted claims before the district court.

The Petitioner then filed a habeas corpus action in Butts County, Georgia, raising the issue that was singled out by the United States District Court. The trial court subsequently dismissed the Petitioner's habeas corpus action on March 16, 1983. An Application for a Certificate of Probable Cause to appeal this denial was denied by the Georgia

Supreme Court on June 21, 1983. A subsequent motion for rehearing on this matter was denied on July 7, 1983. It is from this denial that the Petitioner presently seeks relief before this Honorable Court.

REASONS FOR GRANTING THE WRIT

ISSUE RAISED IN STATE HABEAS CORPUS PROCEEDING:

WHETHER THE PETITIONER WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AS GUARANTEED TO HIM BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION IN THAT THE PETITIONER'S TRIAL COUNSEL FAILED TO CHALLENGE THE GRAND AND PETIT JURY COMPOSITIONS PRIOR TO THE TRIAL OF THE PETITIONER IN PUTNAM COUNTY, GEORGIA.

The Petitioner maintains that the two jury lists, both grand and petit, involved in his indictment and trial were unconstitutionally composed in violation of his due process rights under the Fifth and Fourteenth Amendments to the United States Constitution. The jury lists and box from which the grand and trial juries in this case were drawn were found to be unconstitutionally composed as a matter of fact and law by the United States District Court for the Middle District of Georgia in the case of Willie Bailey, et al. v. Roy L. Vining, et al., Case No. 76-99-MAC. The defect was a violation of the applicable Georgia law, Georgia Code Annotated Section 59-108, as well as a violation of United States Supreme Court decisions.

The conclusion from this case makes it very clear that the jury source involved in the Petitioner's case was tainted, as the list and box were not constitutionally valid.

The Court found in the Bailey case, supra, that there had been intentional underrepresentation of blacks and women, which amounted to systematic exclusion of discreet groups in the community.

The central issue out of which the present ineffective assistance of counsel ground springs, the jury composition issue, has been in the forefront of Petitioner's appeals since the initial appellate stages of Petitioner's case where other trial counsel were involved. The ineffective assistance of counsel aspect of the composition issue was first pressed in the Petitioner's federal habeas corpus action. The United States District Court for the Middle District of Georgia ordered the ineffective assistance of counsel aspect of the jury composition issue sent back to the state habeas court so that it could make an initial determination with regard to that aspect of Petitioner's claims. The Petitioner would respectfully submit that the action of the District Court in sending the petition back to the state rather than ordering the Petitioner the sole choice of amending out the alleged unexhausted claim is an indication that it wanted to afford the Petitioner the opportunity to have this claim considered at the state court level.

The real issue involved in the case is jury composition, and the ineffective assistance of counsel claim is simply another appropriate way to have the basic judicial structure, under which the defendant was tried and given the death penalty in this case, constitutionally tested.

The state in its opposition to the Petitioner's habeas corpus action has cited the case of Dix v. Zant, 249 Ga. 810 (1982). That case is clearly distinguishable from the Petitioner's case in that the ineffective assistance of counsel claim that was raised in a subsequent habeas did not relate to the very vital issue of jury composition, which is clearly

present in the Petitioner's case.

In Goodwin v. Balkcom, Case No. 81-7132, decided September 3, 1982, the United States Court of Appeals for the Eleventh Circuit held that where trial counsel's ineffective assistance, evidenced by his lack of thorough investigation, deprived the defendant of a potential defense and, additionally, the decision to raise what would have been a creditable challenge to the composition of the grand jury was unperceived, the prisoner was entitled to relief in a habeas corpus action. In this case the United States Court of Appeals for the Eleventh Circuit reached the vital issue on the merits that this Honorable Court needs to reach in regard to the Petitioner.

In Dix v. Zant, *supra*, the Court held that a subsequent habeas corpus petition would not effect a waiver if the judge presiding found other grounds in the subsequent petition which could not reasonably have been raised in the original petition or amended petition that was filed. The Petitioner's position has always been that the jury composition issue was not waived by the failure of his counsel to assert it prior to trial because of the system of discrimination that was practiced by the state under the findings in the Bailey case, *supra*. In that case, the District Court held, in effect, that the system of discrimination practiced was a very ingenious form of discrimination which was aimed at avoiding detection. This form of state action was clearly violative of the Petitioner's right to be indicted by a properly composed grand jury and to be tried by a properly composed petit jury. This factual situation led to a position in which the habeas court, under the terms and provisions of O.C.G.A. §9-14-51 (Michie 1982); Ga. Code Ann. §50-127(10) (Harrison 1977), on consideration of the subsequent habeas should have found that the ground for

relief asserted therein was not waived by the failure to specifically set it out in all its particularities in the original habeas petition. The failure of the habeas court to so hold was an abuse of discretion that amounts to state action depriving the Petitioner of vital constitutional rights.

The Petitioner was denied the effective assistance of counsel as guaranteed to him by the sixth and fourteenth amendments to the United States Constitution. The particular allegation relates to the failure of the Petitioner's trial counsel to challenge the grand and petit jury composition prior to the trial of the Petitioner in Putnam County, Georgia. The Georgia Supreme Court held in Amadeo v. The State, 243 Ga. 627 (1979), in the Petitioner's direct appeal that the challenge to the jury composition was without legal merit solely because it came too late. The Petitioner challenges the legal propriety of this ruling. If in fact as a matter of law the challenge came too late, then the Petitioner would maintain that there is a prima facie case made out, by the record, of ineffective assistance of counsel, because his trial counsel did not attempt in any fashion to challenge the jury composition in Putnam County, Georgia before trial. This inaction was violative of his sixth amendment rights to the effective assistance of counsel under the United States Constitution. The jury panels from which the Petitioner was indicted, tried, convicted and sentenced to death have been held by the United States District Court for the Middle District of Georgia to be unconstitutionally composed. The Petitioner desires to have this Honorable Court address the ineffective assistance of counsel allegation in regard to the jury issues.

The present counsel for the Petitioner took over the defense of this case just shortly before the case was originally decided on direct appeal in the Georgia Supreme

Court in Amadeo v. The State, supra. The argument that counsel made in the original habeas corpus petition that was filed in Putnam County was an attempt to be consistent with the very proper argument of nonwaiver of the challenge to the grand and petit jury lists because of the form of discrimination that was practiced in Putnam County prior to the arraignment and trial of the defendant there. To the extent counsel should have raised the ineffectiveness aspect of this argument more specifically in the state habeas proceedings, then present counsel would say that he was ineffective in not raising the issue in this manner at an earlier time. The Petitioner has been given the death penalty and the state intends to carry this forward by its means of electrocution. The Petitioner simply wants his claim that he was improperly indicted and tried by unconstitutionally composed grand and petit juries decided on the merits.

The Petitioner would submit that these claims could not have reasonably been raised at any earlier time consistent with his original position. The legal importance to the Petitioner of having this decided on the merits in this death penalty case is monumental. The Petitioner would maintain that he has not waived his claim that is raised by this habeas corpus petition under the terms and provisions of O.C.G.A. §9-14-51 (Michie 1982); Ga. Code Ann. §50-127(10) (Harrison 1977), that all relief prayed for in the Petitioner's habeas corpus petition should be granted by this Honorable Court.

In Gardner v. Florida, 430 U.S. 349, 51 L.Ed.2d. 393, 97 S.Ct. 1197 (1977), this Court fully recognized that the death penalty is a peculiar breed of sentence when it said:

First, five members of the Court have now expressly recognized that death is a different kind of punishment from any other which may be imposed in this country. Gregg v. Georgia,